In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. [redacted].

RAYMOND J. BERKLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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Now comes Marvin Koblentz and Stanley M. Fisher, on behalf of the petitioner, and respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered April 14, 1961, affirming the judgment of conviction of petitioner.

OPINION BELOW.

The opinion of the Court of Appeals is set forth in the Appendix, *infra*, p. 18, and is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 14, 1961 (App. *infra*, page 25). Petition for rehearing, timely filed, was denied on May 17, 1961 (App. *infra*, p. 26). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Was petitioner denied a fair trial and due process by the admission in evidence by the Trial Judge without qualification of five counterfeit bills found on *police property* under questionable circumstances at least five days after detainment by police of petitioner?

2. Was the circumstantial evidence of these five questionable counterfeit bills sufficient as a matter of law to justify the conviction of petitioner of knowingly passing counterfeit money with intent to defraud?

3. In a circumstantial evidence case where the indictment joins two defendants for the same offense, does an Appellate Court ruling that the trial Judge should have directed an acquittal of one of the defendants by direction require a new trial as to the other defendant?

4. Was petitioner denied a fair trial when Government counsel went beyond the permissible bounds of cross-examination or innocent comment in respect to petitioner's prior record?

STATUTES INVOLVED.

Statute:

June 25, 1948, C. 646, 62 Stat. 928, 28 U. S. C. A. 1254(1):

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree; * * *"

18 U. S. C. A. 472:

> "Whoever with intent to defraud passes, utters, publishes or sells, or attempts to pass, utter, publish, or sell, * * * any falsely made, forged, counterfeited,

or altered obligation or other security of the United States * * *."

Constitutional Amendments:

Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Rule 8 of the Federal Rules of Criminal Procedure, 18 U. S. C. A. entitled "Joinder of offenses and of defendants":

"(a) Joinder of Offenses: Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or

transactions connected together or constituting parts of a common scheme or plan.

"(b) Joinder of Defendants: Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged on each count."

STATEMENT OF THE CASE.

On a clear, bright weekend day in early fall, September 26, 1959, petitioner and Anthony Verzi, who was jointly indicted and convicted with petitioner and his judgment of conviction reversed by the Court of Appeals (App. p. 25) drove from their home town of Cleveland, Ohio to a neighboring town of Ashtabula, Ohio. The purpose of the trip, which was uncontradicted, was to visit an old friend of petitioner who resided in Ashtabula. When they arrived at the home of petitioner's friend, John Brozowski, they found he was not home. Petitioner inquired of a neighbor as to his friend's whereabouts and was told his friend had moved and was given the address of John Brozowski's brother-in-law, John Spasadole. Petitioner and Verzi proceeded to see the brother-in-law who gave them Mr. Brozowski's new address in California. The foregoing was testified to with names and addresses and was uncontradicted (39a, 41a). Before returning to Cleveland, defendants went to the downtown section of Ashtabula to have lunch. After parking their car and proceeding to a restaurant they passed the Puritan Clothing Store where they observed a window display of men's suits (25a, 29a).

While having lunch, petitioner discussed the purchase of a suit since he had won $542.50 at Thistledown Race

Track the previous day (28a). Verzi reminded petitioner of an unpaid debt of $100.00 upon an old wager. Petitioner thereupon offered to buy Verzi a suit in payment of the debt (25a, 30a).

After lunch they went to the Puritan Clothing Store where petitioner after looking at several suits decided to purchase one. The purchase price of the suit was $61.28 (5a) and petitioner tendered a One Hundred Dollar ($100.00) Federal Reserve Note bearing serial number G 42437826 in payment therefor (30a). The owner of the store testified neither petitioner nor Verzi appeared nervous or in a hurry. Verzi saw nothing he liked in this store though he looked around. They then proceeded to shop two other men's clothing stores on the main street (39a, 40a, 41a, 42a) before going into Globe Clothier, where Mr. Verzi purchased a suit to his liking, without any suspicious action on the part of either party. Petitioner was carrying in plain sight his package from the other men's clothing store. Mr. Verzi's suit came to $71.59 and petitioner tendered a One Hundred Dollar ($100.00) reserve note bearing serial number G 42437828-A (26a, 32a). The Government's witness Mr. Loeb stated when he received the $100.00 in payment it looked like a good bill, but that he went to the rear of the store out of sight of petitioner and Mr. Verzi to examine the bill more closely, and because "I have a feeling, as I do with cases of checks, that if anyone has anything in question he will either stand their ground or leave. I came back * * *. They stood their ground, and I examined the bill at the rear of the store as best I could and felt that the bill was all right. * * *" (7a) After leaving Globe Clothiers, Verzi returned to the store and made an additional purchase (8a, 26a). Petitioner and Verzi then proceeded back to Cleveland on the main thoroughfare though it was testified that there were many less conspicuous routes to take if one

wished to avoid police (26a, 42a). The clothing purchased was not concealed in any way. Said clothing was on the back seat in plain view. While en route to Cleveland, petitioner and Verzi were stopped by a State Highway Patrol officer. They readily admitted their identity substantiated by proper identification and readily offered information to their presence in Ashtabula, their purchase of suits, and their payment therefor with two (2) One Hundred Dollar Bills (9a, 10a, 32a, 33a). The suits were readily identified by petitioner as being on the back seat. The petitioner and Verzi were searched by the State Highway Patrol officer and permitted to return to their car alone requesting them to proceed to the State Highway Patrol station. It was a clear, bright day (10a). The State Highway Patrol officer drove behind, keeping the car under constant observation. A police car from Ashtabula with two officers met the Patrol car and petitioner's car en route to the barracks. Petitioner's car was placed in between the two police cars and was under constant observation from the front and back, as testified to by the police officers (9a, 10a, 12a). No suspicious movements of the petitioner or Verzi were seen, nor was anything observed being thrown from the car. At the trial two of the three police officers testified to recalling a slight swerve of petitioner's automobile as it turned into the State Highway Patrol Station. The third officer did not testify to any such swerve and the version of the other two officers differed. One officer described the petitioner's automobile as turning right from Route 20 over the berm of the road into the driveway, and the other officer claimed that the automobile made a right turn over the center of the driveway and that it definitely did not cross over the berm of the road. Petitioner did not know where the barracks were and was following a police car which turned into said drive. When they ar-

rived at the State Highway Patrol barracks, petitioner was allowed to go to the rest room unattended, prior to his being searched (38a). When petitioner and Verzi were searched, they had genuine notes on their person. Defendants were jointly indicted for knowingly with intent to defraud, passing said counterfeit bills. On the trial, which commenced on March 2, 1960, the Government produced one Bruno Pucci, maintenance man at the aforementioned Highway Patrol Post. Over objection (13a), this witness testified to finding five $100.00 bills "padded" together flat on police property adjacent to the heavily traveled main public highway (13a, 15a). He could not recall on what date he found them. It was intimated by Government counsel that it was October 1, 1959. Petitioner and Verzi had been brought briefly to this police property on September 26, 1959. The Government witness also had great difficulty stating where he found the bills. He first stated the bills were in "the driveway by the blacktop approach," then when asked to pinpoint the location on a blackboard, indicated a position not on the driveway (14a). The bills were admitted into evidence over the strenuous objections of defense counsel. The Government's attorney, represented to the Court at the time of the objection that it was admissible on the basis of a specific "Sixth Circuit case that I could cite to Your Honor * * *." No case was admitted or cited. A Government secret service agent testified he did not question either petitioner or Verzi regarding the bills found on police property until January 12, 1960, three and one-half months after they were "discovered," when he commented on them to petitioner without a stenographer, witnesses or transcription of the conversation. He testified he said to petitioner, "That was a pretty cute trick you pulled ditching those notes *from the car* as you pulled in the

Highway Patrol Post" (17a). (Emphasis supplied.) He then testified petitioner smiled and said there were nine of those notes. The Government agent testified there was no other conversation or investigation of said notes. The bills were not even shown to petitioner. Petitioner testified that he gave a facitious answer to the effect "Listen, there could have been nine or ninety. I don't know anything about any bills you might have found out there." (33a). There was no questioning of Verzi as to these bills and he testified he did not see them and did not see petitioner throw them out as inferred by the Government. This same Government agent testified that there was approximately $750,000.00 worth of this particular counterfeit series floating around the country with at least $4,000.00 found in the general area of Ashtabula-Cleveland. He also testified that the bills are not put out in padded form and are not stuck together (20a). Yet, the five bills found on the police property and allegedly thrown from a moving automobile were padded together, flat and not rolled up (15a). The testimony disclosed that petitioner and Verzi in a car under constant observation by police had absolutely no opportunity to "throw" bills out of a car window which was not even shown to be open; that on the other hand, the facts disclose they had numerous opportunities to destroy such bills if they ever had them without "depositing" them on police property. They could have burned them while alone in the car; flushed them down the toilet when allowed to go to the wash room unattended; or disposed of them on the countryside or public highway rather than as alleged on a police driveway constantly traveled over by law enforcement officers (15a). The record reveals that there was nothing to warrant any finding that petitioner or Verzi knew the two bills passed were counterfeit (6a, 7a, 18a, 19a). The Gov-

ernment agent testified that the bills passed could easily be considered by a layman as a bona fide bill (19a).

The Government did not introduce any evidence of prior passing of counterfeit bills in a similar manner in the general area or the entire country for that matter. No evidence of prior connection with counterfeiting or known counterfeiters was introduced. Petitioner took the stand in his defense and was asked initially by his counsel on direct examination whether he had ever been convicted of a felony. Government's counsel in the presence of the jury objected stating in the hearing of the jury "I think that is proper cross examination. Discrediting his own witness." (40a). The Court even agreed with Government's counsel, again in the presence and hearing of the jury. The Government's counsel repeated for the second time in the hearing of the jury "Well, you are discrediting your own witness." On cross examination of petitioner the Government's counsel emphasized petitioner's juvenile record and arrests for other than felonies (42a, 43a). When petitioner objected, the Government's counsel stated in the presence of the jury "I am bringing up matters you would rather not have me bring up." (43a). The Court neither reprimanded Government's counsel nor instructed the jury to disregard his prejudicial remarks. Petitioner's counsel made a motion for judgment of acquittal of both defendants at the end of the Government's case which was denied by the trial Judge (21a). The motion was renewed as to both defendants prior to submission of the case to the jury and denied once again by the trial judge. The jury convicted petitioner and Verzi on both counts. Said convictions were appealed to the United States Court of Appeals for the Sixth Circuit which reversed the judgment of conviction of defendant Anthony Verzi and acquitted him of the offense charged and affirmed the conviction of the

petitioner. The Court held as to Verzi that they were unable to find *any* evidence of sufficient probative value to satisfy the Government's burden of proof that Verzi "with intent to defraud" passed a counterfeit obligation of the United States, and that he "then and there knew that said note was counterfeit" in violation of Title 18, Sec. 472 U. S. C. As to petitioner, the Court, in affirming his conviction, relied solely on the relevancy and materiality of the five counterfeit notes found on police property in holding they were properly admissible and then holding there could be proper inference of petitioner's connection with said notes. On petition for rehearing timely filed by petitioner, it was pointed out that the relevancy and materiality of the five disputed bills was not the crucial issue as indicated by the Court in its opinion, but rather whether the five bills were properly admitted into evidence in the first place, and even if they were, were the inferences necessary for conviction reasonably warranted, solely from these bills especially in light of the reversal of conviction of co-defendant Verzi. It was further pointed out there was no legal "admission" as concluded by the Court by petitioner regarding the disputed five bills found in most unusual circumstances on police property at least five days after detainment.

REASONS FOR GRANTING WRIT.

1. As stated by the Court of Appeals in its opinion (App. p. 23) there is no precedent on the question before the Court on the admissibility into evidence of the five counterfeit bills found on police property under remote and unusual circumstances many days after detention of petitioner and therefore presents a most important question for the administration of criminal justice in the federal courts.

2. The second question relates to the ever recurring problem in federal trials as to the sufficiency of circumstantial evidence as a matter of law to sustain a conviction in a criminal case.

3. The third question raises a substantial question of importance in Federal Criminal Procedure where there is a joinder of defendants in several counts with a jury convicting both on circumstantial evidence and the Court of Appeals subsequently ruling that a judgment of acquittal should have been directed as to one of the defendants. In such case the substantial rights of the petitioner have been affected so as to deny him a fair trial and due process and he therefore is entitled to a new trial.

4. The fourth question relates to the duty of the United States Attorney in a criminal prosecution as defined by this Court in *Berger vs. United States*, 295 U. S. 78, and whether in the instant case he prejudicially went beyond the permissible bounds of cross examination or innocent comment in connection with petitioner's criminal record.

I.

Petitioner's conviction has been sustained solely on inferences permitted to be drawn from the admission of five counterfeit bills "discovered" on police property at

least five days, if not many more days, after the brief passage of a second or less in which petitioner and Verzi drove over the *general* area where the bills were discovered while in a closed car which petitioner was operating, under constant observation by police to the front and to the rear. The grave dangers cannot be ignored inherent in allowing a conviction to stand solely on such questionable and remote evidence found on *police property* many days (the exact time never being positively established) after the alleged crime. There was at least $750,000 worth of these bills known to be in circulation including in this general area. The bills were found on police property adjacent to a heavily traveled public highway. Many police officers and Secret Service agents traveled over this police property very likely with some of this very counterfeit series. The bills under these circumstances could have been placed intentionally by parties unknown or dropped unintentionally by law enforcement officers traveling daily over this area. That they were more likely placed where they allegedly were found than dropped from a moving automobile as contended by the Government is shown by the condition of bills as found. All the bills were "padded" together, flat (15a). The Government agent testified that counterfeit bills are not put out or passed in pad form, nor are they found stuck together. Further, they were not wadded up. If the bills were thrown from a moving car without being wadded up, said bills would have fluttered to the ground like "leaves falling from the trees" and thus been easily detected and spread over a wider area. Complete omission of interrogation of one defendant, Verzi, as to the "discovery" of said disputed bills and the brevity and delay of 3½ months in mentioning the bills to petitioner and then without witnesses or a reporter indicates the lack of credence placed in such evidence by the Gov-

ernment. *The approval of the admission of such evidence under the circumstances of this case will of necessity open a Pandora's box and offer temptations too great for over-zealous police and prosecutors to resist.* The admission of such evidence was admittedly without precedent as stated by the Court of Appeals, though the trial judge's ruling undoubtedly rested heavily on the United States Attorney's representation to the Court of a nonexistent Sixth Circuit case as precedent (13a). Further the trial judge admitted these bills without qualification as to both defendants. The Court of Appeals cited *York vs. United States*, 241 Fed. 656 (C.A. 9, 1916) and *Carrullo vs. United States*, 184 F. 2d 743, 746 (CA 1950) as general authority, though admittedly, not precise authority, supportive of their conclusion that the disputed bills were admissible in support of needed proof of guilty knowledge. The Court of Appeals thus erroneously emphasized relevancy and materiality of the bills as proving an essential element of the crime in determining the *admissibility* of the bills. The speculative and remote nature of the bills and the lack of proper foundation for their admission as to this petitioner were not considered. In the *York* case, *supra*, at 658, the evidence considered was the *direct* evidence of prior passing of a counterfeit bill by the defendant therein. There was no speculation or conjecture for the jury as to which defendant, if any, passed the counterfeit money. In *Carrulo*, *supra*, the Government introduced evidence that twelve counterfeit bills had been passed at different roadhouses not far from each other under *similar* circumstances on the very *same* night defendant was accused of passing bogus bills in two roadhouses nearby. The time, place, and condition of finding the disputed bills in the instant case, with their unqualified admission into evidence, denied petitioner due process and a fair trial.

II.

It is not the Appellate Court's function to determine guilt or innocence. *Weiler vs. United States* 323 U. S. 606, 611; *Bollenback vs. United States* 326 U. S. 607, 613-614. The Court of Appeals stated correctly in its opinion, "It was for the jury to resolve any factual issue involved." However, it was not for the jury to speculate on circumstantial evidence of the nature presented in this case. The record is completely devoid of *any* direct evidence to support the essential elements of the crime charged. Certainly, none of the circumstantial evidence relied upon by the Government is inconsistent with every reasonable hypothesis of the innocence of petitioner. There is no presumption of guilty knowledge on the part of petitioner, and substantial, credible evidence is required beyond proving the passing of the spurious obligation. It is essential and necessary that substantial evidence point *unerringly* and beyond a reasonable doubt to the other essential elements of the crime—knowledge and intent. As shown by the facts of this case, the evidence relied on by the Government is, to say the least, speculative and certainly as consistent with innocence of petitioner as with guilt. A jury cannot be permitted to infer guilt on mere suspicion and conjecture.

III.

Rule 8 of the Federal Rules of Criminal Procedure, 18 U. S. C. A. permits joinder of two defendants in several counts. It is recognized that in such an indictment so far as the jury is concerned, the indictment is to be considered a several one as to each offender. It follows that in a proper case the jury technically may acquit as to some, convict as to others, and find no verdict as to other, because they cannot agree. Petitioner was joined with Anothony

Verzi in two counts. The Court of Appeals said the trial judge should have directed an acquittal as to Verzi as to both counts and so directed such an acquittal. In light of the circumstantial evidence relied upon by the Government in its conviction of both defendants, the question is presented as to what effect the trial judge's failure to direct an acquittal of defendant Verzi had or reasonably may be taken to have had upon the jury's decision as to petitioner. It is not the Appellate Court's function to speculate upon probable reconviction and decide according to how the speculation comes out. *Kotteakos vs. United States* 328 U. S. 750.

Both defendants were occupants of the car from which the Government alleges the five disputed bills were thrown on the police property. How can we guess or speculate, as to whether the jury in face of a judgment of acquittal as to Verzi, would have speculated, as they were allowed, which one, if any of the two occupants of the car had possession of the disputed bills or threw them from the car. It is clear with the admission of the disputed bills, petitioner was clearly prejudiced by the failure of the Court to direct an acquittal as to Verzi, wherein the jury could justify their speculation on the theory they were joint conspirators and did not matter which one, if any, had possession of the disputed bills. Remember that Verzi testified he was in the car with petitioner and never saw the disputed bills nor saw petitioner throw anything from a car. He further substantiated petitioner's other testimony and witness. If a judgment of acquittal had been directed to Verzi at the trial, the weight given by the jury to his corroborating testimony would have of necessity been greater. Petitioner had small chance of a fair trial under such circumstances and such denial of new trial under such circumstances offers grave possibilities of injustice.

IV.

From the circumstantial evidence presented by the Government in this case, it is obvious that the Government attempted to create a web of suspicion about the two defendants. Petitioner's counsel, in effort to prevent the Government from prevailing on the weakness of the defendant's background, rather than upon the strength of its own case initially, asked petitioner on direct examination whether he had ever been convicted of a felony. Immediately the Government's counsel objected, claiming this was proper cross-examination for the Government and further commenting before the jury "Discrediting your own witness." Rather than reprimanding Government counsel for the latter remark, the Court added its dignity thereto by agreeing with counsel for the Government. (40a.) Thereupon he responded a second time in the presence of the jury "Well, you are discrediting your own witness." Subsequently, on cross-examination of petitioner, the Government's counsel prejudicially and improperly emphasized petitioner's juvenile record and arrests for other than felonies. (42a, 43a.) When petitioner objected, the Government's counsel countered in the presence of the jury without reprimand by the trial judge "I am bringing up matters you would rather not have me bringing up." (43a.) None of petitioner's prior convictions or arrests had anything to do with the crime charged. There can be no doubt that the improper comments and cross-examination by the Government's counsel had a telling effect with the jury who would of necessity rely upon such improper injections of conclusions on the part of its guardians of the law. It would be ridiculous to think that the Government's attorney had not carefully reviewed the criminal record of petitioner in advance and knew the proper limitations on the use of such record. It was his

duty to be fair and impartial in presenting evidence for the prosecution and in commenting on petitioner's evidence and in cross-examining him. The rights of petitioners were substantially prejudiced by the Government's attempt to discredit him by innuendo and suspicion rather than by competent testimony. The Government went beyond the permissible bounds of cross-examination or innocent comment. *Berger vs. United States* 295 U. S. 78.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

MARVIN A. KOBLENTZ,
Counsel for Petitioner.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided April 14, 1961.)

Before SIMONS, Senior Circuit Judge, O'SULLIVAN, Circuit Judge, and BOYD, District Judge.

O'SULLIVAN, Circuit Judge. Defendants-appellants, Raymond J. Berkley and Anthony Verzi, were convicted by a jury of passing two counterfeit $100.00 bills (Federal Reserve notes) (Title 18, U. S. C. § 472). Berkley was sentenced to four years imprisonment and Verzi to eighteen months. Defendants here claim that they should have been acquitted by direction of the trial judge, and, alternatively, that a new trial should be ordered because of the admission of certain evidence offered by the government.

The government's evidence may be summarized as follows: On September 25, 1959, defendants were in the city of Ashtabula, Ohio. They entered a clothing store and Berkley there purchased a suit of clothes, paying for it with a $100.00 counterfeit bill. Berkley received the change required by the price of the suit and defendants left with the suit. Berkley advised that he would prefer to have necessary alterations made by his own tailor. Shortly thereafter defendants entered a second clothing store where defendant Verzi selected a suit which was paid for by defendant Berkley with another $100.00 counterfeit bill. After leaving this latter store, Verzi returned and purchased a lapel handkerchief. One of the store proprietors testified that Berkley identified himself as a night club proprietor from Erie, Pennsylvania. This was not true.

Shortly after the above purchases were made, it was discovered that the $100.00 bills so passed by Berkley were

counterfeit. This information and a description of the defendants was radioed to police cars. Defendants, then driving back to Cleveland, were observed by a highway patrolman who stopped them. After searching defendants for weapons, getting their names and examining Berkley's driver's license and car registration certificate, the officer directed them to proceed to the Ohio State Highway Patrol Station. Defendants and the officer then proceeded toward Ashtabula. En route, an Ashtabula police captain intercepted them and the three cars then proceeded to the police post, the highway patrol car in front and the police captain's car behind the one occupied by defendants. While the cars were thus proceeding, police officers in the rear car kept the defendants' car under observation to see if anything would be thrown out of either side. They saw nothing thrown out. However, as defendants' vehicle turned to the right into the Patrol Post driveway, it appeared to be momentarily out of control, during which interval, "a fraction of a second," the officer's vision of the driver's side of the Berkley car was blocked. At the police post, the suits purchased were found in the Berkley car. Berkley admitted buying the suits with the $100.-00 bills which he then claimed he had won in a poker game. Both defendants denied knowledge that the bills were counterfeit.

Defendants were indicted on October 22, 1959. On the trial, which commenced on March 2, 1960, the government produced one Bruno Pucci, maintenance man at the mentioned Highway Patrol Post. Over objection, this witness testified that on October 1, 1959, while spreading crushed stone on the driveway at the Patrol Post, he found in a hole which he was filling a packet of five counterfeit $100.00 bills. Four of these bore a serial number one digit higher than one of the two bills which had been

passed by the defendant Berkley five days previously. The fifth bore the identical serial number as one of the bills so passed by Berkley. A government secret agent testified that no genuine bills ever bear the same serial numbers. Such agent further testified that all of the counterfeit bills introduced in evidence were part of a production of about one million dollars' worth, $750,000.00 worth of which were seized before they had been put in circulation. The balance had been put in circulation all over the country. About forty of such $100.00 counterfeit bills had been seized in the Cleveland, Ohio, area in the fourteen months preceding the trial, including some that were seized subsequent to defendants' apprehension on September 26, 1959. The same government witness testified that on January 12, 1960, he talked with defendant Berkley concerning the five counterfeit bills found in the Patrol Post driveway, stating to Berkley, "That was a pretty cute trick you pulled ditching those notes from the car as you pulled in the Highway Patrol Post." Asked what Berkley's reply was, the witness said, "He smiled and said there were nine of those notes." On cross examination, the witness said that he did not think Berkley's answer was meant to be facetious. The store proprietors who received the bills testified that when received, they believed them to be genuine. The secret service agent testified that non-experts might accept the bills as bonafide—that they were considered a good counterfeit job.

Defendant Berkley had a prior criminal record of two felonies and some juvenile offenses. Defendant Verzi had no criminal record. Berkley, testifying in his own behalf, gave the following account of his possession and passing of the counterfeit bills: He had acquired the bills as part of his winnings in the daily double at a race track on the day previous to passing them; that on the day in question

he drove to Ashtabula to look up an old friend. Verzi went along at Berkley's invitation. They discovered that Berkley's old friend had moved away some eight or nine months previously. They then parked Berkley's car and on their way to lunch Berkley saw a suit of clothes in the store window that struck his fancy. At lunch he told Verzi of his previous day's winnings at the race track, the sum of $542.50. At this news, Verzi reminded Berkley that the latter owned Verzi $100.00 on a bet previously made between them on the outcome of the American League pennant race. Thus reminded, Berkley said he would pay the bet, or if Verzi wished, Berkley would buy Verzi a suit of clothes, Berkley having decided to buy himself a suit. After lunch, both men went to the clothing store whose suit display had attracted Berkley. He there chose a suit, tendering a $100.00 bill he had won in payment. He was given the necessary change, advising the merchant that he would have the needed alterations, including "cuffing," done by his own tailor. This transaction was at the Puritan Store. Both defendants then proceeded to the Globe Clothiers where Verzi chose a suit which Berkley paid for with another of the $100.00 bills in question. Berkley testified that he gave the change from this bill to Verzi to complete payment of his wagering debt of $100.00. Verzi testified that Berkley kept the change. Both defendants said that Verzi returned to the Globe Clothiers and purchased a handkerchief. The government's evidence had indicated that this purchase had been made as Verzi was leaving the store after the purchase of his suit.

Berkley's account of the January, 1960, conversation with the government secret service agent concerning the bills found in the driveway rebutted any implication connecting him with such bills. He said that his reply to the agent's prodding that defendant was "pretty slick" in

throwing them out of the car and that they had found five of them in the driveway was, "* * * there could have been nine or ninety. I don't know anything about any bills you might have found out there."

Defendant Verzi testified that while in Ashtabula he had no idea of the denominations of the bills that made up Berkley's track winnings, or whether Berkley actually had them with him. He testified that he never saw the bills used by Berkley in paying for the suits and as to the purchase made in the first store, he did not know that Berkley had used a $100.00 bill. Verzi testified that he saw nothing dropped or thrown from the car in which he and Berkley were driving on their way to the Patrol Post.

Verzi verified winning the $100.00 wager from Berkley on the baseball pennant race and was corroborated in this by a relative who testified for defendants. It was inferrable from the testimony that the bet was really not expected to be paid and only Berkley's good fortune in the daily double prompted these sportsmen to recognize the obligation of such a substantial wager.

Except for what inferences might be drawn from the events outlined above, there was no evidence of any kind that Verzi had anything to do with the counterfeit bills or had any knowledge they were counterfeit.

We shall discuss the grounds relied on for reversal as follows:

1) *Admissibility and materiality of the evidence of the counterfeit bills found in the police driveway.* It was the burden of the prosecution to prove, not only the passing of the counterfeit bills, but also to supply evidence from which the jury could find, beyond a reasonable doubt, that defendant Berkley "with intent to defraud" passed each counterfeit note and "knew that said note was counterfeit" as charged in the indictment. *Zottarelli v. United*

States, 20 F. (2) 795, 798 (C. A. 6, 1927), cert. denied 275 U. S. 571; *Marson v. United States*, 203 F. (2) 904 (C. A. 6, 1953); *Price v. United States*, 70 F. (2) 467 (C. A. 4, 1934). Evidence which would directly, or by legitimate inference, prove such knowledge and intent was admissible and material. Evidence of remote or disconnected circumstances without probative value beyond mere suspicion, or the reception of which would violate traditional rules of evidence may not be used to supply proof of knowledge and intent. We, however, do not consider that the evidence of the finding of the five-counterfeit bills in the police driveway was so remote or disconnected from other established events as to destroy its admissibility or probative value. Supporting its relevancy and materiality were these circumstances. The five bills were found at a place where defendant Berkley had driven his car five days before their discovery; Berkley's abrupt turn of his car at that point which took his side of the car out of the view of the officers; the serial numbers on the bills so found were within two digits of, or identical with, the passed counterfeit bills; and Berkley's assertion that there were nine bills instead of five, when asked about that number being found. If the jury accepted the secret service agent's account of Berkley's statement, such account indicated some knowledge by Berkley of the bills so found. It was for the jury to resolve any factual issue involved.

Neither the briefs of counsel nor our own research provides us with any precedent containing facts which would make any decided case a controlling authority on the question before us. The fact that the discovery of the bills in the driveway did not occur until five days after Berkley's opportunity to drop them there does not, under all of the circumstances, render their discovery too remote. We need not decide whether the passage of a longer

period of time would render them inadmissible. Neither do we have to here decide whether the discovery of the five bills would have been admissible evidence, absent the statement by defendant Berkley to the government agent which disclosed his knowledge of them. Their admissibility is clearly aided by Berkley's admission.

The finding of counterfeit bills at places where an accused had recently passed other counterfeit bills has been received in support of needed proof of guilty knowledge. *York v. United States,* 241 Fed. 656 (C. A. 9, 1916); *Carrullo v. United States,* 184 F. (2) 743, 746 (C. A. 8, 1950). In these cases, less time elapsed between the passing of the counterfeit bills and the finding of others than in the case before us. Accordingly, they do not provide precise precedent, but are generally supportive of our conclusion. Appellant Berkley asserts that to have allowed the jury in the case at bar to consider the evidence under discussion was a violation of a rule of evidence which, it is claimed, forbids the basing of an inference upon an inference. Aside from whether there is today any such precise rule of evidence [*Wigmore on Evidence,* 3rd Ed., § 41; *Toliver v. United States,* 224 F. (2) 742, 745 (C. A. 9, 1955); Annotation 95, A. L. R. 162], we are satisfied that here there was evidence of facts concerning the five counterfeit notes from which an inference of Berkley's connection with them could be legitimately drawn.

We find no error in the admission of this questioned evidence.

2) *Should a verdict of acquittal of defendant Berkley have been directed?* On such question, the trial judge, as well as this court, must view the evidence and the inferences that may justifiably be drawn therefrom, in the light most favorable to the government. *Battjes v. United States,* 172 F. (2) 1, 5 (C. A. 6, 1949). It was for the

jury to determine the credibility of witnesses, including defendants, and to weigh the evidence. Applying the test which we must employ, we are satisfied that there was sufficient evidence to permit the jury to pass upon the guilt of the defendant Berkley.

3) *Should a verdict of acquittal of defendant Verzi have been directed?* Each count of the indictment charged that the defendant Verzi, "with intent to defraud" passed a counterfeit obligation of the United States, and that he "then and there knew that said note was counterfeit" in violation of Title 18, § 472, U. S. C. We may assume that if Verzi was aware that the bills passed by Berkley were counterfeit, he was a participant in the criminal enterprise involved.

However, it was the duty of the government to produce evidence from which the jury by finding certain facts to be true, or by drawing legitimate inferences from proven facts, could find, beyond a reasonable doubt, that defendant Verzi knew that the bills passed by Berkley were counterfeit. *Zottarelli v. United States*, 20 F. (2) 795 (C. A. 6, 1927); *Marson v. United States*, 203 F. (2) 904, 906 (C. A. 6, 1953); *Price v. United States*, 70 F. (2) 467 (C. A. 4, 1934); *United States v. Carll*, 105 U. S. 611 (1882). Suspicion that Verzi had guilty knowledge will not suffice. Without again reciting our review of the government's case against Verzi, we are unable to find any evidence of sufficient probative value to satisfy the government's burden of proof. Verzi should have been acquitted by direction.

The judgment of conviction of defendant Raymond J. Berkley is affirmed; the judgment of conviction of defendant Anthony Verzi is reversed and he shall stand acquitted of the offense charged.

BOYD, District Judge, dissenting. With due deference to my colleagues, I would not only affirm the judgment of conviction entered by the District Court as to the defendant Berkley but also as to the defendant Verzi.

In my opinion, substantially competent evidence to support the conviction of both defendants is present.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(May 17, 1961.)

Before SIMONS, Senior Circuit Judge, O'SULLIVAN, Circuit Judge, and BOYD, U. S. District Judge.

THIS CAUSE is before the court upon the petition for rehearing of defendant Raymond J. Berkley, and the court having reviewed the same, and upon due consideration,

IT IS ORDERED that the petition for rehearing be, and it is, hereby denied.

Approved for entry.

CLIFFORD O'SULLIVAN,

United States Circuit Judge.

SUPREME COURT, U. S.
JUL 13 1961
JAMES R. BROWNING, Clerk

No. 147

In the Supreme Court of the United States

OCTOBER TERM, 1961

RAYMOND J. BERKLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 18-26) is reported at 288 F. 2d 713.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1961. A petition for rehearing was denied on May 17, 1961 (Pet. 26). The petition for a writ of certiorari was filed on June 14, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for passing two $100 counterfeit notes, the trial court erred in admitting evidence that five other counterfeit $100 notes were found, at the entrance to police headquarters, in a driveway over which petitioner had driven one week earlier while under police escort en route to such headquarters for questioning.

2. Whether the evidence was sufficient to support the conviction.

3. Whether the petitioner was prejudiced by the trial court's failure to direct a verdict of acquittal for a co-defendant whose conviction was reversed on appeal.

4. Whether the prosecutor improperly cross examined the petitioner about prior convictions that the petitioner had disclosed on direct examination.

STATEMENT

The petitioner and one Anthony Verzi were convicted in the Northern District of Ohio on two counts of passing counterfeit $100.00 Federal Reserve notes, in violation of 18 U.S.C. 472. Petitioner was sentenced to four years' imprisonment. The court of appeals unanimously affirmed the petitioner's conviction, but, with one judge dissenting, reversed Verzi's conviction on the ground that there was no proof that he knew the bills were counterfeit (Pet. 25-26).

The evidence may be summarized as follows:

On September 26, 1959, the petitioner and Verzi drove from Cleveland, Ohio, to the city of Ashtabula,

Ohio (Tr. 152-153, 203-204).[1] The petitioner testified that he had won $542.50 at the race track on the previous day (Tr. 201). While in an Ashtabula restaurant, the petitioner told Verzi of his winnings; Verzi then reminded the petitioner that he owed Verzi $100 on a bet on the baseball pennant race (Tr. 156-158, 202-203). The petitioner offered to buy Verzi a suit to settle the debt (Tr. 158, 210). Both men went to the Puritan Clothing Store and the petitioner purchased a suit for himself, paying for it with a $100 Federal Reserve note, serial number G 42437826 A (Tr. 58, 105, 212, 214). The manager of the store testified that the petitioner addressed Verzi as "Mr. Demarco" and asked, "[W]hy don't you buy a suit?" (Tr. 8), but apparently Verzi did not like any of the clothes in the shop (Tr. 160). Both men then proceeded to the Globe Clothiers, approximately two blocks away (Tr. 161), where Verzi found a suit to his liking (Tr. 162, 217). Petitioner paid for the suit with another $100 Federal Reserve note, serial number G 42437828 A (Tr. 29-30, 195, 217-218). Both of these notes were counterfeit (Tr. 102, 105). The two men then left for Cleveland (Tr. 220).

Meanwhile, each store manager became suspicious that the bill he had received was counterfeit, and went to the police station to report the incident (Tr. 12, 32, 67-68). The police captain, upon examining the bills, concluded they might be bogus, and sent out an alarm for the petitioner and Verzi (Tr. 38-39,

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[1] Tr. refers to the trial transcript, a copy of which has been lodged with the Clerk.

69). The two men were spotted some fifteen miles west of Ashtabula by Ohio Highway State Patrolman David Furiate. He stopped the petitioner's car and instructed the petitioner to turn around and head back to the Ohio State Highway Patrol Post located just west of Ashtabula (Tr. 43, 47). The petitioner's automobile was followed by Patrolman Furiate until they reached Geneva, Ohio (ten miles west of Ashtabula), where they were intercepted by Chief of Police Gordon Arvidson of the Ashtabula Police Department (Tr. 49, 72). Patrolman Furiate then took a position just to the front of the petitioner's automobile, and Chief Arvidson followed it (Tr. 49, 72).

Patrolman Furiate testified that, upon arriving at the patrol post, he observed in his rear view mirror that the petitioner swung his automobile in a "jerky motion" in pulling in to the post and went over some lawn shrubbery (Tr. 50). Chief Arvidson testified that when petitioner's car turned into the patrol post it "swerved to the right," "went up onto the lawn and some shrubbery," and "hit some of the bushes" (Tr. 73). He further testified that while he had been able to observe the petitioner's side of the automobile through all of the trip, he momentarily lost sight of it at the moment the car swerved into the post driveway (Tr. 75).

Approximately one week after this incident, the patrol post gardener discovered a packet of five counterfeit $100 Federal Reserve notes in a hole in the driveway. Four of the five notes bore the serial number, G 42437829 A, which was only a digit higher

than one of the bills passed in Ashtabula (see *supra*, p. 3). The fifth bill bore the serial number, G 42437828 A, the same number as appeared on the note passed in the Globe Clothiers shop (see *supra*, p. 3) (Tr. 87-88, 89-91, 105-107).

Patrolman Furiate testified that, following the apprehension of the two men, the petitioner said he received the two $100 bills in a poker game (Tr. 59). At the trial, the petitioner testified that he had won the money at the race track (Tr. 201). Secret Service Agent Robert Lowery testified that on January 12, 1960, petitioner contacted the agent. During the interview the agent said to the petitioner, "That was a pretty cute trick you pulled ditching those [five] notes from the car as you pulled in the Highway Patrol Post". The petitioner "smiled and said there were nine of those notes" (Tr. 115-116).[2]

Petitioner testified that he did not know that the two notes he passed were counterfeit (Tr. 237). He denied throwing anything out of his car (Tr. 227), and stated that he had never seen the packet of five notes found on the patrol post driveway (Tr. 231-232).

ARGUMENT

1. Petitioner's principal contention (Pet. 11-13) is that the trial court erred in admitting into evidence the five counterfeit $100 notes found on the patrol

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[2] Petitioner testified that, in reply to the agent's statement, he said: "Listen, there could have been nine or ninety. I don't know anything about any bills you might have found out there" (Tr. 231).

post driveway (see the Statement, *supra*, pp. 4-5). While evidence of remote or disconnected circumstances that is too weak to be of any probative value is not admissible, here the evidence was relevant to the issue whether the petitioner knew that the two notes he had passed were counterfeit. A number of facts developed at the trial justified the inference that the petitioner threw the five notes from his car to the driveway. The notes were found at the very place where the petitioner, five days earlier and when he was about to be questioned and examined by the police, had swerved his car in an unusual manner so that the observing officer's view was temporarily obstructed (Tr. 50, 75). The serial numbers on the five notes corresponded, except for a variance in the last digit on four of them, to the ones admittedly passed by the petitioner (Tr. 87, 105-107).[4] The testimony of the Secret Service agent indicated that the petitioner had admitted his knowledge of the discarded bills (Tr. 115-116).

If, as the jury apparently concluded, the petitioner had thrown the five counterfeit bills from his car, this fully justified the inference that he knew that the two notes he had previously passed were also counterfeit. The five notes were thus properly admitted in evidence; the weight to be given to them, of course, was for the jury to determine.

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[4] The petitioner admitted passing bills which bore serial numbers G 42137826 A and G 42137828 A. Four of the five bills found bore the number G 42137829 A and the other bore G 42137828 A, or the same as one of the bills that the petitioner passed.

2. The sufficiency of the evidence presents no question warranting review by this Court. Since the petitioner admitted that he passed the bills, the only question at issue was his knowledge of their counterfeit character. In addition to the fact that, as noted above, the jury was entitled to draw the inference that petitioner had thrown five additional counterfeit bills out of the car, there was the further circumstance that petitioner gave conflicting stories as to how he received the money. He first told the police that he won it at poker. At the trial he stated he won it at the races. The bills were cashed in a town other than that where petitioner lived. The jury could properly conclude that all the circumstances together showed guilty knowledge. See *United States* v. *Jonikas*, 187 F. 2d 240, 241 (C.A. 7).

3. There is no merit to petitioner's contention that he was prejudiced because the trial court did not order an acquittal of the co-defendant Verzi before the case went to the jury. Rule 29(b) of the Federal Rules of Criminal Procedure provides in part that:

> If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or *after it returns a verdict of guilty* or is discharged without having returned a verdict. * * * [Emphasis added.]

Thus, if the trial court had deferred ruling on motions for acquittal until after the jury had found both defendants guilty, and had then directed an ac-

quittal of Verzi, its action would have been proper. *United States* v. *Griffin*, 176 F.2d 727, 728 (C.A. 3), certiorari denied, 338 U.S. 952. *A fortiori*, there was no error in allowing the case to go to the jury where it was the appellate court, rather than the trial court, which concluded that the evidence was insufficient to establish Verzi's guilt.

Moreover, the petitioner could not have been prejudiced by the failure to direct an acquittal of Verzi for the trial judge gave separate instructions as to each defendant, and pointed out that Verzi could be guilty only as an aider and abettor (Tr. 279, 281).

4. In this Court the petitioner for the first time makes the claim that the prosecutor was guilty of misconduct in his comments and cross-examination with respect to the petitioner's prior criminal record. Since no objection was raised at the trial and no issue with respect thereto was raised before the court of appeals, the objection comes too late. In any event, it is without merit.

At the outset of the petitioner's direct examination, he was asked about his prior felony convictions. The prosecutor objected, on the ground that defense counsel was "[d]iscrediting his own witness" (Tr. 197, 198). When the court stated that "[u]sually it comes out on cross examination" (Tr. 197), defense counsel replied that "we would like to show it in our direct examination" (Tr. 198). The court replied (Tr. 198): "Well, go ahead if you want to do it that way, but it is generally done the other way." Plainly, there was nothing improper in these statements of either the prosecutor or the court.

On his direct examination, the petitioner stated that he had been convicted of the crimes of burglary, larceny and safe tampering in 1948 and 1954, that he had been imprisoned in the Ohio State Penitentiary, and that he had been released on parole in 1958 (Tr. 198-199). On cross-examination, the prosecutor attempted to trace the petitioner's years in jail. The petitioner stated that he was "first arrested and convicted of a State or Federal crime" in 1954 (Tr. 238-239). When the prosecutor asked about 1942, the petitioner stated that that involved "some Juvenile trouble" and "was not a felony conviction" (Tr. 239). The prosecutor then questioned petitioner with respect to his record after he became 18, the age at which Ohio treats criminal defendants as adults (Ohio Revised Code 2151.01). The petitioner stated that the first time he was in jail after reaching 18 was in 1948 (Tr. 239). He stated that in 1944 he was in the reformatory as a juvenile offender, that he was paroled in 1945 when he was 19 years old, and that in 1946 he was "returned to the institution as a parole violator" when he was 20 years old. Immediately thereafter, he admitted that he was sentenced at that time (1946) to one to twenty years for burglary and safe tampering (Tr. 240). After the prosecutor had questioned the petitioner with respect to his 1954 conviction and the sentence he had served thereunder (Tr. 240-241), the following colloquy ensued (Tr. 241):

> Q. What I am trying to figure out, Mr. Berkley, is how many years you have actually been in jail since you reached the age of 18?

A. Mr. Sennett, you asked me a question. How many felony convictions did I have against my person and I told you two.
Q. Now I am—
A. You are bringing up matters of the State of Ohio that are Juvenile matters, not considered felonies under the State laws.
Q. I am bringing up matters you would rather not have me bring up.

We submit that the prosecutor committed no prejudicial misconduct during his cross examination of the petitioner. The "matters" that the petitioner "would rather not have [the prosecutor] bring up" were not his record as a juvenile offender (which cannot be used to impeach the credibility of a witness), but the fact that the petitioner was attempting to give the impression that his 1946 felony conviction was merely for a juvenile offense. Although the prosecutor did refer to 1942, he dropped the line of inquiry as soon as petitioner stated that that year involved only "some Juvenile trouble" and "not a felony conviction" (Tr. 239). It was petitioner, and not the prosecutor, who sought to convey the impression that his 1946 conviction was for a juvenile offense. The petitioner falsely stated on cross examination that he had first been convicted of a state or federal felony offense in 1954; on direct, he had stated that his first felony conviction was in 1948, a date that was actually 1946. Since prior felony convictions may be used to impeach a witness, and since it was petitioner who was attempting to make it appear that his first felony conviction was merely for a juvenile offense, the prosecutor was warranted in probing the circumstances of

that first conviction to show that in fact it had occurred when petitioner was 20 years old and therefore no longer a juvenile.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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